122 FERC ¶ 61,025
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Constellation Energy Commodities Group, Inc. Docket No. EL07-42-001

ORDER DENYING REHEARING

(Issued January 17, 2008)

1. On July 23, 2007, Constellation Energy Commodities Group, Inc. (Constellation) requested rehearing of the Commission's June 21, 2007 order[1] denying Constellation's petition for a declaratory order clarifying the relationship between Constellation's rights under its power purchase agreements with Narragansett Electric Company (Narragansett) and section VIII (A) of the Forward Capacity Market (FCM) Settlement Agreement. For the reasons discussed below, we deny rehearing.

I. Background

2. Constellation sells wholesale energy and capacity to Narragansett at fixed prices pursuant to four power purchase agreements negotiated under Constellation's market-based rate authority.[2] Constellation claims that each power purchase agreement contains an "equitable adjustment clause" entitling it to renegotiate the price whenever any regulatory change materially alters the economic benefits and burdens contemplated by the parties at the time they executed the agreement. Narragansett disagrees with Constellation's interpretation of the power purchase agreements, and claims that Constellation must sell to Narragansett at the fixed prices specified in the power purchase agreements regardless of Constellation's costs.

3. Constellation asserts that it has contractual rights to renegotiate the prices in the power purchase agreements in light of the fact that its costs for securing capacity have

[1] *Constellation Energy Commodities Group, Inc.*, 119 FERC ¶ 61,292 (2007) (June 21 Order).

[2] Petition for Declaratory Order of Constellation Energy Commodities Group, Inc., at 15 (Petition for Declaratory Order).

increased as a result of the FCM Settlement Agreement.[3] In March 2007, Constellation filed a petition for a declaratory order requesting that the Commission rule on the relationship between Constellation's renegotiation rights under the power purchase agreements and section VIII (A) of the FCM Settlement Agreement.[4] In the June 21 Order, the Commission denied Constellation's petition. The Commission held that the United States District Court for the District of Rhode Island (District Court) had concurrent jurisdiction to determine the relationship between the power purchase agreements and section VIII (A),[5] and that resolving this question did not require the Commission to assert primary jurisdiction under *Arkansas Louisiana Gas Co. v. Hall*.[6]

II. Rehearing Request

A. District Court's Jurisdiction

4. Constellation requests rehearing of the Commission's holding that the District Court has concurrent jurisdiction in this case. Constellation argues that, because the

[3] The FCM Settlement Agreement establishes a capacity auction in New England beginning on June 1, 2010. In the interim, the FCM Settlement Agreement establishes a transition period during which capacity will be sold according to fixed prices. Constellation claims that these fixed transition prices are dramatically higher than the prices that existed when Constellation and Narragansett agreed to the fixed prices in the power purchase agreements.

[4] Section VIII (A) states that:

> The current UCAP [unforced capacity] products shall be retained for the period commencing on December 1, 2006 and ending on May 30, 2010 (the "Transition Period") as provided for in Part VIII. Payments will be made to UCAP entitlement holders, and made by UCAP obligation holders including wholesale standard offer suppliers in Rhode Island as under the current Market Rules and tariffs; it being understood that the agreement of wholesale standard offer suppliers in Rhode Island to make UCAP payments is contingent upon the agreement of the state of Rhode Island utility regulatory authorities to support the settlement.

[5] At the time Constellation filed its petition, this issue was already the subject of a suit in the District Court. That suit is currently pending.

[6] *Arkansas Louisiana Gas Co. v. Hall*, 7 FERC ¶ 61,175, at 61,322 (*Arkla*), *reh'g denied*, 8 FERC ¶ 61,031 (1979).

Commission has exclusive jurisdiction to interpret and enforce Commission-approved settlement agreements, the District Court lacks jurisdiction to determine the relationship between the power purchase agreements and section VIII (A). In this regard, Constellation claims that this case is indistinguishable from *Sunoco*,[7] where the Commission affirmed and exercised exclusive jurisdiction over Commission-approved settlement agreements.

5. Constellation also argues that the Commission has exclusive jurisdiction under the filed rate doctrine and the *Mobile-Sierra* doctrine.[8] Constellation characterizes Narragansett's action before the District Court as an action for contract reformation, arguing that Narragansett is seeking a ruling that Constellation's renegotiation rights are affected by the FCM Settlement Agreement. Constellation maintains that the District Court lacks jurisdiction to issue such a ruling because both the filed rate doctrine and the *Mobile-Sierra* doctrine establish that no rates, terms, or conditions in the power purchase agreements can be altered without an explicit Commission finding that the modification is in the public interest.

6. Narragansett and the Attorney General of Rhode Island filed answers to Constellation's rehearing request. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits answers to requests for rehearing.[9] Accordingly, we reject the answers.

7. We deny rehearing. At the outset, we affirm our holding that the issue before us is the proper interpretation of the power purchase agreements in light of section VIII (A).[10]

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[7] *Sunoco, Inc. (R&M) v. Transcon. Gas Pipe Line Corp.*, 111 FERC ¶ 61, 400 (2005) (*Sunoco I*), *reh'g denied*, 114 FERC ¶ 61,180 (2006) (*Sunoco II*), *aff'd sub nom. Transcon. Gas Pipe Line Corp. v. FERC*, 485 F.3d 1172 (D.C. Cir. 2007) (*Sunoco III*) (collectively, *Sunoco*).

[8] *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344-45 (1956) (*Mobile*); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353-55 (1956) (*Sierra*).

[9] 18 C.F.R. § 385.713(d)(1) (2007).

[10] For example, in the June 21 Order, we stated that "Constellation is asking the Commission to declare that Section VIII (A) does not preclude Constellation from exercising whatever renegotiation rights . . . Constellation has under the power purchase agreements." June 21 Order at P 6. *See also id.* P 1 (describing Constellation's petition as a request that "the Commission declare that Section VIII (A) . . . has no effect on Constellation's rights to renegotiate") and *accord id.* P 23 (describing what was before the Commission as a "dispute" "over the effect the FCM Settlement Agreement has on their power purchase agreements").

Throughout this proceeding, Constellation has attempted to narrow the issue in this case to focus solely on section VIII (A).[11] However, in actuality, even Constellation does not request that we interpret section VIII (A) in a vacuum; rather, Constellation requests that we interpret section VIII (A) with respect to its impact on its power purchase agreements with Narragansett. Reduced to its basic elements, the question of whether Constellation is precluded from exercising renegotiation rights in light of section VIII (A) is an issue of contract interpretation that requires careful examination of both the power purchase agreements and section VIII (A). For example, we could not determine the relationship between Constellation's renegotiation rights under the power purchase agreements and section VIII (A) without first establishing whether Constellation has any renegotiation rights, and if so, what they are and how they operate.[12] This would require us to make a close examination of the power purchase agreements, and to inquire into the parties' intent in creating whatever renegotiation rights may exist.[13]

8. While the Commission is certainly competent to make these determinations, inquiring into the parties' intent with respect to the power purchase agreements and discerning how those agreements are affected by section VIII (A) does not require the Commission's special expertise or touch on matters within the Commission's exclusive

[11] We acknowledge that, notwithstanding the statements referenced in the previous footnote, our own description of the issues in this case has been inconsistent and ambiguous at times, and may inadvertently have coincided with Constellation's faulty description of the issues. For example, to the extent that our statement that "Constellation's dispute with Narragansett is a dispute over the meaning of Section VIII (A) of the FCM Settlement Agreement," June 21 Order at P 22, implies our agreement with Constellation's framing of the issues, we clarify that this statement is incomplete and must be read in conjunction with our holding in the next paragraph of the order that what is ultimately at issue is Section VIII (A)'s "relationship to the power purchase agreements." *Id*. P 23.

[12] Narragansett has petitioned the District Court for a declaratory judgment that Constellation "accepted responsibility for providing [Narragansett] with the capacity required to serve [Narragansett's] retail standard customers at the fixed prices in the [power purchase agreements], regardless of the prices Constellation must pay to secure that capacity." *See* Narragansett's Protest at 8. In other words, whether the power purchase agreements grant Constellation renegotiation rights is a contested issue before the District Court.

[13] Where parties have negotiated the terms of their power sales agreement in a competitive market-based environment, the Commission's policy has been to minimize its involvement in such negotiated arrangements. *See Dartmouth Power Associates Ltd. P'ship v. Commonwealth Electric Co.*, 73 FERC ¶ 61,096, at 61,309 (1995). We see no compelling reason to make an exception in the present dispute.

jurisdiction. Rather, these are the types of matters that are routinely handled by the District Court. Accordingly, we continue to believe that in these specific circumstances, the District Court has concurrent jurisdiction in this case.

9. Next, we disagree with Constellation's assertion that this case is indistinguishable from *Sunoco*, where according to Constellation, the Commission affirmed its exclusive jurisdiction to interpret a Commission approved settlement agreement as "solely within the Commission's special expertise to resolve."[14] Rather, we find that the facts in *Sunoco* are entirely different from the facts here, and, as a consequence, Constellation's reliance on *Sunoco* is misplaced. In our view, a careful look at *Sunoco* demonstrates that Constellation has taken the Commission's holding there out of context, and moreover, illustrates why it was proper for the Commission to claim exclusive jurisdiction there, but not here.

10. In *Sunoco*, the Commission directed Transcontinental Gas Pipe Line Corporation (Transco) to reimburse Sunoco, Inc.(Sunoco) for the additional costs that Sunoco would incur as a result of Transco's violation of a 1992 settlement agreement in which Transco agreed to provide natural gas gathering and transportation services to Sunoco for 20 years. Pursuant to the settlement agreement, Sunoco and Transco entered into a Firm Transportation (FT) service agreement entitling Sunoco to a special firm service not otherwise available at a special, reduced rate; however, in 2000, Transco decided to sell to its affiliate, Williams Gas Processing (Williams), certain gathering facilities on which Sunoco was entitled to receive the special firm service. The Commission determined that the proposed sale would violate the 1992 settlement agreement, and directed Transco to reimburse Sunoco for any additional costs that might result.[15]

11. The "principal contention" in *Sunoco* was whether the Commission lacked jurisdiction to impose this remedy because the gathering services became non-jurisdictional once transferred to Williams.[16] However, and relevant here, Transco also asserted that the issues in the case were more properly before a local court because the FT service agreement provided that the law of Texas would apply.

12. The Commission rejected Transco's assertion that the case belonged in state court, and held that the Commission had exclusive jurisdiction to interpret and enforce the settlement agreement. The Commission stated that it would "not cede to the state court

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[14] *Sunoco II*, 114 FERC ¶ 61,180 at P 35.

[15] *Sunoco I*, 111 FERC ¶ 61, 400 at P 14.

[16] *See Sunoco III*, 485 F.3d at 1174. *See also Sunoco I*, 111 FERC ¶ 61, 400 at P 14. Both the Commission and the Court of Appeals determined that the Commission had jurisdiction to order the remedy.

either the Commission's jurisdiction to determine if the Commission-approved settlement ha[d] been violated or [the Commission's] discretionary authority to decide what remedy should be imposed to rectify that violation."[17] On rehearing, the Commission affirmed its conclusion, noting that "[t]he FT service agreement, under which Sunoco receives service, is simply the *pro forma* FT service agreement of the tariff, the interpretation of which is not open to question."[18] Moreover, the Commission explained that the issue in the case was "the interpretation of a Commission-approved settlement that is solely within the Commission's special expertise to resolve."[19]

13. These holdings, however, must be viewed in light of their intimate connection to the facts in *Sunoco*, which involve the Commission's role in enforcing Commission-approved settlement agreements, and its special expertise in interpreting *pro forma* service agreements. Unlike *Sunoco*, the instant case does not require interpretation of a *pro forma* service agreement or involve the Commission's jurisdiction to determine whether the FCM Settlement Agreement has been violated, and if so, to order an appropriate remedy. Rather, it involves interpretation of the power purchase agreements in light of section VIII (A) of the FCM Settlement Agreement. In contrast to its expertise in interpreting the *pro forma* FT service agreement, "the interpretation of which is not open to question," the Commission does not possess special expertise to interpret the power purchase agreements and any renegotiation rights under those agreements. Accordingly, we are not persuaded that discerning what the parties intended with respect to any renegotiations of the power purchase agreements is "solely within the Commission's special expertise to resolve."

14. Finally, we reject Constellation's argument that the Commission has exclusive jurisdiction here because of the filed rate and *Mobile-Sierra* doctrines. Constellation argues that these doctrines apply because Narragansett has petitioned the District Court to modify the power purchase agreements. We disagree with this characterization of Narragansett's complaint. Narragansett has not requested that the District Court modify the rates, terms, or conditions of the power purchase agreements; rather, Narragansett has petitioned the District Court for a judgment as to the proper interpretation of the power purchase agreements, and a declaratory order on the relationship between the power purchase agreements and section VIII (A).

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[17] *Sunoco I*, 111 FERC ¶ 61, 400 at P 32.

[18] *Sunoco II*, 114 FERC ¶ 61,180 at P 35.

[19] *Id*.

B. Primary Jurisdiction

15. Constellation also requests rehearing of the Commission's decision not to assert primary jurisdiction in this case. Constellation renews its argument that each of the *Arkla* factors[20] supports the Commission asserting primary jurisdiction. First, Constellation argues that this case requires the Commission's special expertise because the Commission is "far better suited" than the District Court to address whether the market design changes contained in the FCM Settlement Agreement were "intended to alter and bar parties from exercising bilateral contract rights."[21] Second, Constellation argues that the issue of how and when settlement agreements modify bilateral contract rights requires a uniform Commission response. Next, Constellation claims that clarifying the relationship between settlement agreements and bilateral contract rights goes to the "very core" of the Commission's regulatory responsibilities. Finally, Constellation maintains that parties will be reluctant to enter into settlement agreements if courts permit settlements to alter bilateral contract rights without mentioning the specific contracts or contract rights, or without containing a specific Commission finding modifying the contracts or contract rights. Constellation claims that this situation will force potentially affected contract counterparties "to carefully monitor, scrutinize, and protest future settlements effectuating market rule changes" to protect against silent modification of their rights.

16. We deny rehearing. In the June 21 Order, the Commission declined to assert primary jurisdiction after evaluating this case according to the factors set forth in *Arkla*. The Commission determined that it did not possess special expertise in this matter, that this case did not implicate uniformity because it is merely a dispute between Constellation and Narragansett over the relationship between the power purchase agreements, and section VIII (A), and that resolving this dispute is not important in relation to the Commission's regulatory responsibilities. On rehearing, Constellation has made no new arguments prompting us to reconsider. Rather, Constellation has continued to portray this case as presenting a general threat of settlement agreements silently altering bilateral contracts, instead of, as it should be, a case about the power purchase agreements and renegotiation rights under those agreements. Accordingly, we remain convinced that this case does not require us to assert primary jurisdiction and deny rehearing.

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[20] These factors are: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised in the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission. *Arkla at 61,322*.

[21] Constellation's Rehearing Request at 10.

The Commission orders:

Constellation's request for rehearing is hereby denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.